Housing Development Corp v Riaplus Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02–106 OF 2008
ABU SAMAH, MOHD HISHAMUDIN AND AZIAH ALI JJCA
4 JUNE 2012

Contract — Agreement — Nature of — Landowner and developer agreed to ratio to apportion number of houses each would receive on development of land — Parties agreed to adjust apportionment as per ratio if authorities altered number of houses on land — Authorities increased number of houses to be built but developer concealed fact from landowner — Developer meanwhile bought all of landowner's houses at agreed price — Whether developer liable to compensate landowner for additional houses due to latter under apportionment ratio

The appellant landowner ('HDC') engaged the respondent ('Riaplus') under a development agreement ('DA') to construct 327 residential houses on its land. The parties agreed that HDC would retain 70 of the houses whilst the remaining 257 would be transferred to Riaplus. Clause 2 of the DA provided that if the relevant authority altered the number of sublots comprised in the project, the number of houses each party would receive would be adjusted in accordance with the ratio 70:257. The parties also executed an option agreement under which Riaplus could offer to buy HDC's alloted 70 houses at a price of RM60,000 per unit. Clause 7 of the option agreement provided that if the number of sublots allocated to the parties was altered pursuant to cl 2 of the DA, then the purchase price and the schedule of payments would be adjusted accordingly. After HDC accepted Riaplus' offer to purchase its 70 sublots and the full purchase price of RM4.2m for them was paid and the sublots were transferred to Riaplus, it discovered that well before the sale of the 70 sublots the Land and Survey Department when approving the layout plan and subdivision of the land had increased the number of sublots on the land to 572 units from the proposed 327 units. Riaplus knew of this but concealed that information from HDC. Pursuant to the 70:257 entitlement ratio specified in the DA, HDC claimed it was entitled to an additional 52 residential lots and on the basis of RM60,000 per lot, it claimed RM3.12m from Riaplus as unpaid purchase price for those lots. The High Court dismissed HDC's claim agreeing with Riaplus' contention that under cl 8 of the option agreement HDC was required to transfer the legal title in the whole of the land to Riaplus whereupon, notwithstanding any other provision contained in the DA, HDC's legal or beneficial interests and rights in the land or under the DA was extinguished. As a result, the High Court held HDC's reliance on cl 2 of the DA was misplaced. HDC appealed to the Court of Appeal against the decision.

Held, allowing the appeal with costs and setting aside the order of the High Court:

(1) Riaplus could not rely on cl 8 of the option agreement as it had withheld crucial information from HDC when it made the offer to purchase HDC's sublots, that information being the fact the Land and Survey Department had increased the number of approved sublots from 327 units to 572 units (see para 23).

(2) HDC was entitled to its claim for RM3.12m by reason of cl 2 of the DA read with cl 7 of the option agreement. The meaning in those two provisions was clear. There was no ambiguity. It was a fact there had been an alteration to the number of sublots allocated to the parties pursuant to cl 2 of the DA and therefore the purchase price and the schedule of payment had to be adjusted accordingly (see para 23).

[Bahasa Malaysia summary

Perayu, pemilik tanah ('HDC') melantik responden ('Riaplus') di bawah perjanjian pembangunan ('PP') untuk membina 327 rumah kediaman di atas tanahnya. Pihak-pihak bersetuju bahawa HDC akan mengekalkan 70 daripada rumah-rumah kediaman tersebut sementara baki 257 akan dipindahkan kepada Riaplus. Klausa 2 PP memperuntukkan bahawa jika pihak berkuasa yang relevan mengubah nombor sublot-sublot yang terdapat dalam projek, bilangan rumah-rumah setiap pihak akan terima akan diselaraskan mengikut ratio 70:257. Pihak-pihak juga melaksanakan perjanjian opsyen di mana Riaplus dapat menawar untuk membeli 70 buah rumah yang diperuntukkan kepada HDC pada harga RM60,000 per unit. Klausa 7 perjanjian opsyen memperuntukkan bahawa jika bilangan sublot-sublot yang diperuntukkan kepada pihak-pihak diubah berikutan klausa 2 PP, oleh itu harga belian dan jadual bayaran akan diselaraskan dengan sewajarnya. Selepas HDC menerima tawaran Riaplus untuk membeli 70 sublotnya dan harga belian penuh sejumlah RM4.2 juta untuk sublot tersebut dibayar dan sublot tersebut dipindah kepada Riaplus, ia mendapati bahawa sebelum jualan 70 sublot tersebut Jabatan Tanah dan Ukur apabila meluluskan pelan susun atur dan pembahagian tanah telah menambahkan bilangan sublot atas tanah tersebut kepada 572 unit daripada 327 unit yang dicadangkan. Riaplus mengetahui mengenai ini tetapi menyembunyikan maklumat daripada HDC. Berikutan nisbah kelayakan 70:257 yang dinyatakan di dalam PP, HDC menuntut yang ia berhak kepada 52 lot kediaman tambahan atas dasar RM60,000 satu lot, ia menuntut RM3.12 juta daripada Riaplus sebagai harga belian yang tidak dibayar untuk lot-lot tersebut. Mahkamah Tinggi menolak tuntutan HDC bersetuju dengan hujahan Riaplus bahawa di bawah kl 8 perjanjian opsyen HDC dikehendaki untuk memindahkan hak milik dalam kesemua tanah tersebut kepada Riaplus di mana walaupun terdapat apa-apa peruntukan lain yang terkandung di dalam PP, kepentingan undang-undang atau benefisial HDC dan hak di dalam tanah atau di bawah PP adalah terhapus. Akibatnya,

Mahkamah Tinggi memutuskan penggantungan HDC ke atas kl 2 PP disalahletakkannya. HDC merayu kepada Mahkamah Rayuan terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan dengan kos dan mengenepikan perintah Mahkamah Tinggi:

(1) Riaplus tidak dapat bergantung ke atas kl 8 perjanjian opsyen kerana menyembunyikan maklumat penting daripada HDC apabila ia membuat tawaran untuk membeli sublot HDC, maklumat tersebut adalah fakta bahawa Jabatan Tanah dan Ukur telah menaikkan bilangan sublot daripada 327 unit kepada 572 unit (lihat perenggan 23).

(2) HDC berhak kepada tuntutannya untuk RM3.12 juta atas alasan klausa 2 PP dibaca bersama dengan kl 7 perjanjian opsyen. Maksud kedua-dua peruntukan adalah jelas. Tidak dapat kekaburan. Ia adalah fakta bahawa terdapat perubahan kepada bilangan sublot yang diperuntukkan kepada pihak-pihak berikutan kl 2 PP dan oleh itu harga belian dan jadual bayaran patut diselaraskan sewajarnya (lihat perenggan 23).]

Notes

For cases on nature of agreement, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2823–2826.

Appeal from: Civil Suit No 22–55 of 2003 (High Court, Sibu)

Raymond Lau (Susanna & Lau) for the appellant.
KY Lim (Julie Pao (Huang & Co) for the respondent.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the High Court of Sibu given on 6 December 2007.

[2] In its decision, the High Court of Sibu gave judgment in favour of the respondent/defendant, in that, it dismissed the appellant's/plaintiff's claim with costs.

[3] Hence, there is this appeal by the appellant/plaintiff.

[4] On 18 October 2011 we, unanimously, allowed the appeal with costs.

[5] And we now give our grounds.

[6] The appellant's/plaintiff's claim against the respondent/defendant is for a

sum of RM3,120,000 pursuant to two agreements entered into between the appellant/plaintiff and the respondent/defendant, namely:

(a) an agreement which the parties called the 'development agreement' made on 14 December 1994; and

(b) another agreement which the parties called the 'option agreement', also made on 14 December 1994.

[7] The appellant/plaintiff was the owner of a 22.9 hectares piece of land.

[8] Under the development agreement, the appellant/plaintiff engaged the respondent/defendant as a developer to construct 327 residential houses on the land in return for which the appellant/plaintiff would transfer 257 to the respondent/defendant.

[9] Clause 2 of the development agreement provides as follows:

> 2 Consideration
>
> In consideration of clause 1 above, the Landowners shall, subject to clauses 11 and 16 herein retain 70 of the 327 sublots together with the completed houses thereon (hereinafter referred to as 'the Landowners' Sublots') and shall transfer to the Developers the other 257 sublots together with the completed houses thereon (hereinafter referred to as 'the Developers' Sublots') PROVIDED that if the number of sublots comprised in the Project is lawfully altered by the Relevant Authority, the number of sublots allocated to each Party shall be adjusted accordingly (to the nearest sublot) to accord with the ratio 70:257.

[10] By the option agreement the respondent/defendant offered to purchase the appellant's/plaintiff's 70 residential sublots under the development agreement at a total price of RM4,200,000 (which is equal to RM60,000 per sublot).

[11] Under cl 3 of the option agreement, the appellant/plaintiff has to accept the respondent's/defendant's offer 'in writing' within six months from 14 December 1994.

[12] Clause 7 of the option agreement, provides as follows:

> 7 Adjustment of Purchase Price
>
> In the event that the number of sublots allocated to the parties are altered pursuant to the proviso to clause 2 of the Development Agreement, then the Purchase Price and the Schedule of Payment herein contained shall be adjusted accordingly.

[13] There is no evidence of any acceptance by the appellant/plaintiff within the six-month period (this six-month period expired on 13 June 1995).

[14] However, some eight months later after the expiry date, that is to say, on 16 February 1996, the respondent/defendant decided to purchase the appellant's/plaintiff's sublots. It conveyed its intention to the appellant/plaintiff through the common solicitor of the parties, namely, Messrs David Allan & Teng Advocates.

[15] The appellant/plaintiff accepted the offer and transferred the land to the respondent/defendant for the sum of RM4,200,000 as stated in the option agreement. The transfer was completed by the registration of the memorandum of transfer on 13 February 1997. The purchase price of RM4,200,000 was paid progressively by installments and was fully paid on 9 November 2000.

[16] However, prior to the respondent/defendant communicating to the appellant/plaintiff of its intention to purchase (in February 1996), an event unbeknown to the appellant/plaintiff happened. What transpired was that on 7 December 1995, when the Land and Survey Department approved the layout plan and the subdivision, the department increased the number of sublots approved to 572 units, instead of the proposed 327 units. The respondent/defendant, however, did not notify the appellant/plaintiff of the increment; and neither did the respondent/defendant forward to the appellant/plaintiff the approved layout plan.

[17] However, in early January 2001 the appellant's/plaintiff's land officer made an inspection of the construction site. He then discovered that the number of sublots completed does not tally with the 'proposed plan' that they had in their possession. This prompted the appellant/plaintiff to ask the respondent/defendant to furnish them the layout plan that was approved by the Land and Survey Department (it is to be recalled that it was approved by the department in 1995). The respondent/defendant supplied the appellant/plaintiff with the approved layout plan on 29 January 2001. Upon examining the approved layout plan, the appellant/plaintiff discovered that the number of residential sublots approved for the project had been increased: that it is now 572 sublots, and no longer 327 lots as originally proposed. Based on the entitlement ratio of 70 units to 257 units as between the appellant/plaintiff and the respondent/defendant, respectively, under the development agreement, the appellant/plaintiff now claims to be entitled to an additional 52 residential lots. And on the basis of RM60,000 per lot, the appellant/plaintiff now claims a further sum of RM3,120,000 as the balance of the purchase price due from the respondent/defendant.

[18] In support of its claim, the appellant/plaintiff relies on cl 2 of the development agreement and cl 7 of the option agreement.

[19] The respondent/defendant resisted the appellant's/plaintiff's claim. In disputing the appellant's/plaintiff's claim, the respondent/defendant relies on cl 8 of the option agreement. This clause states:

> 8. Transfer of Land
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> Upon the provision of an acceptable bank guarantee or other similarly acceptable facilities mentioned above being so arranged, the Landowners shall immediately transfer the legal title in the whole of the Said Land (including the Landowners' Sublots) to the Developers. Whereupon notwithstanding any other provision contained in the said Development Agreement but subject to clauses 6.1 and 6.2 thereof, the Landowners' legal or beneficial interests and rights in the Said Land or under the said Development Agreement shall be extinguished. Provided that:
>
> 8.1 clauses 18, 19, 20, 21, 28, 29 and 30.1 of the said Development Agreement shall continue to apply; and
>
> 8.2 clauses 18 and 19 thereof shall also apply to the Landowners' Sublots as if the words 'Landowners Sublots' were substituted therein for the words 'Developers' Sublots'.

[20] The learned High Court judge accepted the respondent's/defendant's argument. The learned High Court judge said in his grounds of judgment:

> There is merit in the case for the defendant in its reliance on cl 8 of the option agreement.

[21] The learned judge reasoned as follows:

> Where, as here, the rights and obligations of the parties have been reduced into writing, in the form of the development agreement and the option agreement, it is incumbent upon the court to look at them for what they are stated to be, construed as a whole in their plain and ordinary meaning (see *National Coal Board v Wm Neill & Sons (st Helen)* [1994] 1 All ER 555). Clearly, the reference in cl 7 of the option agreement to the proviso in cl 2 of the development agreement must refer to 'completed houses' because the proviso cannot swallow the substantive provision of cl 2. To hold otherwise would render the substantive provision of cl 2 of the development agreement ineffectual which would manifestly be in consistent with its plain and ordinary meaning. Hence, the purchase price of RM4,2000,000 under the option agreement calculated on the basis of the plaintiff's entitlement of 70 lots with completed houses thereon at an agreed price of RM60,000 per lot cannot be varied upwards simply because of the numerical increase ultimately approved by the relevant authority. Conversely, it would have been equally ridiculous for the defendant to have sought a proportionate refund had the number of lots approved been less than that which was stated in the development agreement.

…

At the risk of repetition, it cannot be overemphasised that the all-encompassing words 'notwithstanding any other provision contained in the said development agreement but subject to cll 6.1–6.2 thereof, the landowners' legal or beneficial interests and rights in the said land or under the said development agreement shall be extinguished' render the proviso to cl 2 of the development agreement ineffectual. The plaintiff's reliance on it is, therefore, misplaced.

…

In my judgment, the plaintiff has failed to establish its claim and the action is accordingly dismissed with costs to be taxed.

[22] With respect, we are unable to agree with the learned judge.

[23] In allowing this appeal, we accept the submission of the appellant/plaintiff that it is entitled to its claim of an additional payment of RM3,120,000 by reason of cl 2 of the development agreement read with cl 7 of the optional agreement. The meaning of these two provisions is clear. There is no ambiguity. It is a fact that there has been an alteration of the number of sublots allocated to the parties pursuant to cl 2 of the development agreement, and therefore 'the Purchase Price and the Schedule of Payment … shall be adjusted accordingly.' In our judgment the respondent cannot rely on cl 8 of the optional agreement as it had withheld a crucial information from the appellant/plaintiff when it made the offer to purchase in February 1996, that information being the fact that the Land and Survey Department had increased the number of approved sublots from 327 units (as proposed) to 572 units (an increment of 122 units).

[24] We, therefore, set aside the order of the High Court.

[25] Instead, we allow the appellant's/plaintiff's claim for the additional payment of RM3,120,000. There shall be order in terms as per prayers (a)–(b) of para 19 of the statement of claim.

[26] Appeal allowed with costs here and below of RM20,000 to the appellant/plaintiff.

Appeal allowed with costs and order of the High Court set aside.

Reported by Ashok Kumar